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No. 73-1424

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA

v.

DAVID EMERY SERFASS, PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Opinion of the Court of Appeals (A. C) is reported at 492 F. 2d 388. The Opinion of the District Court (A. A) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 20, 1974. The Petition for a Writ of Certiorari was docketed on March 22, 1974, and was granted on April 22, 1974 (A. M). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an Appeal by the Government from the pre-trial dismissal of an indictment based on a full review of the Government's evidence put the defendant in double jeopardy?

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment provision:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .";

and

18 U.S.C. 3731 provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a Court of Appeals from a decision, judgment, or order of a District Court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits its further prosecution. . . .
>
> "The provisions of this Section shall be liberally construed to effectuate its purposes."

STATEMENT

Petitioner had been ordered to report for induction into the Armed Forces of the United States on December 18, 1970. The induction was to have taken place on January 18, 1971.

David [illegible]. Serfass was a member of the Peace Corps and was serving on Panape, a remote Pacific island. Among other things he was engaged in training a native as a superintendent of construction to build, repair, and maintain, an air-strip and a road on this small island. His military service had been deferred for two years while he was performing this service in the interest of the United States. Shortly before the conclusion of his two years of service in the Peace Corps he was requested to stay in Panape a few more months to complete the training of the native superintendent. He agreed to stay and notified his Draft Board of this change. He was ordered to take his pre-induction physical examination at an United States Army installation in Guam, and as a consequence of events over which he had no control, and a substantial amount of bureaucratic red-tape, and no available transportation, he could not get to Guam. He was then ordered by his Draft Board to report for transportation for induction at the Salvation Army headquarters in Allentown, Pennsylvania; he was required to be there at 5:00 A.M. on December 18, 1970. He did everything but swim from Panape and arrived in Allentown at 2:00 A.M., and three hours later stood in line at the Salvation Army waiting to board a bus to go to the induction center in Wilkes-Barre, Pennsylvania. He went to the induction center but was found to be afflicted with amoebic dysentery, was sent home, and was rescheduled to be inducted on January 18, 1971.

On December 29, 1970 your Petitioner requested a special form for conscientious objectors (Form SSS–150). (Selective Service File, pages 74, 75.) His Local Board, Local Board No. 89, of Pennsylvania, then received the completed Form 150 from the Petitioner, who requested a courtesy interview on January 11, 1971, and received such on January 13, 1971. (Selective Service File, pages 77, 78-97.) The Local Board considered his entire file at a meeting on January 13, 1971 and on January 14, 1971, Petitioner was informed that the Board unanimously agreed "that there was no change over which the [Petitioner] had no control." On this basis, the Board decided not to reopen his file. (Selective Service File, page 103.) The Petitioner then refused induction at the examining station in Wilkes-Barre, Pennsylvania, on January 18, 1971. (Selective Service File, 118.) Petitioner was thereafter indicted on October 10, 1972, the indictment being for a violation of 50 U.S.C. App. 462(a). At the arraignment, Petitioner pleaded "Not Guilty" and a trial date was set. A Motion to Dismiss the Indictment was filed, (A. D) along with a supporting affidavit (A. E). The Briefs of the Government and your Petitioner were submitted and an argument on the Motion to Dismiss was held before Judge Michael Sheridan, Chief Judge, United States District Court for the Middle District of Pennsylvania, at which time there was also an oral stipulation of counsel, relating to the fact that Petitioner had made out a prima facie case for

conscientious objector status. Shortly thereafter, and before decision, the entire Selective Service File of the Petitioner, at the request of Judge Sheridan and mutual consent of Serfass and the Government, was submitted to the Judge (A. J&K).

In an Opinion filed July 16, 1973, Judge Sheridan granted the Petitioner's Motion to Dismiss the Indictment. (A. L) The Court, noting that the material facts had been derived from Petitioner's Affidavit in Support of the Motion to Dismiss, the entire Selective Service File, and from Admissions of Counsel during the oral argument on the question, held that the statement of reasons given by the Draft Board was sufficiently ambiguous to be reasonably construed as a rejection on the merits which would prejudice your Petitioner's right to in-service review and, therefore, granted the Motion to Dismiss.

The United States filed a timely Motion of Appeal to the Third Circuit Court of Appeals seeking a review of the District Court's Order dismissing the Indictment. The Government in its Brief stated that jurisdiction was based on 18 U.S.C. 3731, as well as arguing on the merits. Petitioner's Brief contended that the Order of the District Court dismissing the indictment was not an appealable order and that the Circuit Court of Appeals, therefore, did not have jurisdiction to hear the Appeal as the Petitioner would then be put twice in jeopardy. (The main thrust of the argument in both cases was on the merits.) The Court of Appeals held, after dispensing with oral argument, that jeopardy had not yet attached and, therefore, dismissal of the indictment in the instant case was an appealable order, and went on to decide the merits of the Government's Appeal, reversing the decision of the lower court and remanding to the District Court for trial. (A. C)

SUMMARY OF ARGUMENT

Petitioner argues that the Government does not have the right to appeal under the Criminal Appeals Act, 18 U.S.C. 3731 for the reason that he is put in double jeopardy by virtue of

that appeal. It is contended specifically that appeal by the United States is barred by prior jeopardy when the District Court grants a pre-trial Motion to Dismiss, relying on facts outside the indictment, these facts being derived from the defendant's affidavit in support of his motion, his entire Selective Service File, and from a Stipulation of Counsel at Oral Argument on the Motion to Dismiss, such Order by the District Court being the functional equivalent of an acquittal on the merits.

In support of this position, Petitioner argues that the double jeopardy provision of the United States Constitution should not be applied with the use of mere technicalities. Specifically, it is argued that although the general principle as to whether or not jeopardy has attached revolves around the question as to whether or not jury trial has either been waived and the court has begun to hear evidence or the jury has been impaneled and sworn, this is only a presumption. Petitioner further argues that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached.

This position is made particularly forceful in light of the fact that the Court considered all the evidence that the Government had to present. It is argued that because of this, it would be exalting form over substance to allow an appeal in a situation where a second prosecution would be clearly barred. In this vein, it is clear that the Government did not have to enter into a stipulation nor did it even have to assent to a hearing on the Motion to Dismiss. It is suggested that both Petitioner and the Government were concerned with the elimination of unjustifiable expense and delay in accordance with the Federal Rules of Criminal Procedure. In this light, the determination was evidently made by the Government that since all the facts were present upon which a resolution of the matter depended, it would aid both parties to have the matter heard and disposed of

at a hearing of the Motion to Dismiss.

Justice would dictate that in a case where the Government's evidence has been thoroughly reviewed by the District Court and what is the functional equivalent of a judgment of acquittal has been entered, Petitioner should not be subject to any further actions against him, even in the form of an appeal by the Government.

ARGUMENT

This case raises very important issues on the meaning of the double jeopardy clause of the United States Constitution and the statutory construction of the recently amended Criminal Appeals Act, 18 U.S.C. Section 3731. The construction of this statutory section, as applied by the Third Circuit Court of Appeals in this Case, has put the Defendant, Petitioner, twice in jeopardy in violation of the clear import of the statute itself and the United States Constitution.

It appears that the amendment to the Criminal Appeals Act under consideration was prompted by problems of appealability encountered by the Department of Justice. (Amendments to the Criminal Appeals Act, S. Rep. No. 91-1296, 91st Cong., 2d Sess.) Petitioner also recognizes that the action taken by the Congress was also prompted by the decision of the Supreme Court in *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970). Justice Harlan, writing for the Court, had indicated in his Opinion that the statute as it existed at that time left much to be desired as far as its applicability to the present procedural categories of the Federal Rules of Criminal Procedure, as its roots were grounded in pleading distinctions that existed at common law. It is clear, however, that even given the reasons for the amendment of the statute, this does not obviate the necessity for looking at each case as it arises on its own factual background. The Supreme Court has admonished against the use of technicalities in interpreting the double jeopardy provision of the United States Constitution. See *Illinois v. Somerville*, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973).

The principle enumerated in the Fifth Amendment of the Constitution under consideration is truly an ancient concept in the civilized world. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959). (Black J. dissenting.) In fact, it has been traced back to the time of Demosthenes, 355 B.C., when he stated that,

> "The laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." 1 Demosthenes 589 (Vance trans. 1962). Cited in *U.S. v. Jenkins*, 490 F. 2d 68, 70 (2nd Cir., 1973).

This ancient concept is not always easy to apply but its basic reasoning is centered around the proposition that,

> "The State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. U.S.*, 355 U.S. 184, 187-188, 78 S. Ct. 221, 2, L. Ed. 2d 199 (1957).

With these concepts in mind, other courts have stated that even though the general principle as to whether or not jeopardy has attached revolved around the question as to whether or not jury trial has either been waived and the Court has begun to hear evidence or the jury has been impaneled and sworn, this is only a strong presumption, which it is argued, should be rebuttable. See *U.S. v. Velazquez*, 490 F. 2d 29 (2nd Cir., 1973). See also *U.S. v. Pecora*, 484 F. 2d 1289, 1293, (3rd Cir., 1973) where in distinguishing *U.S. v. Hill*, 473 F. 2d 759, (9th Cir., 1972) the Court stated that the District Court in *Hill, supra*, determined the character of evidence entered into the record and concluded that, therefore, jeopardy had attached. The critical question then to be determined is really a policy determination in any

given situation, that is,

> "Whether the Government's action . . . reached the point where the Government's power to retrace its steps is checked by countervailing interests of the individual protected by the double jeopardy clause of the Fifth Amendment." *Velazquez, supra,* at 1096.

In the case at hand, it is important to review the facts at this point which would specifically relate to the question presented. First, it is important to note that by virtue of the presentation of the Defendant's affidavit in support of his Motion to Dismiss, then later his entire Selective Service File, and from the Stipulation of Counsel, none of the facts upon which the resolution of the Motion depended was in dispute. Second, Briefs were submitted and a confrontation between the parties in the form of oral argument took place. With this situation, the District Judge determined that,

> "Although Defendant has not waived his right to trial by jury a defense based upon an alleged procedural defect in the Selective Service classification process is to be determined by the Court." Fed. R. Crim. P. 12(b)(4)." *United States of America v. David Emery Serfass,* No. 15229 Cr., July 16, 1973. (A. A)

The first argument of Petitioner centers around the proposition set forth in *United States v. Sisson,* 399 U.S. 267, 289, 290, 26 L. Ed. 2d 608, 90 S. Ct. 2117 (1970), that

> "Quite apart from the statute, [in this case the Supreme Court was referring to the old 18 U.S.C. 3731] it is, of course, well settled that an acquittal can 'not be reviewed on error or otherwise, without putting [the Defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence,' ". Citing *United States v. Ball,* 163 U.S. 662, 671. 41 L. Ed. 300, 16 S. Ct. 1192 (1896).

The question then becomes whether the decision of Judge Sheridan, although labeled a Dismissal of the Indictment was

the functional equivalent of an acquittal on the merits. First of all, it would be necessary to find that the trial court had, in fact, reached beyond the face of the indictment, gathering "evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial.". *United States v. Brewster,* 408 U.S. 501, 506, 33 L. Ed. 2d 507, 514, 92 S. Ct. 2531 (1972). It is unequivocally clear that the Judge reached beyond the face of the indictment in that he considered the Defendant's affidavit in support of his Motion to Dismiss, the entire Selective Service File, which was ordered by the Judge to be sent to the Court (A. J), and the Admission of Counsel which in *Velazquez, supra,* at 1098, is cited as being equivalent to a showing of evidentiary facts outside of the indictment, such Admission relating to the fact that the information which had been submitted by Petitioner to his Local Selective Service board had, in fact, established a prima facie claim for conscientious objector status based upon a late crystallization. The question then remaining would be whether or not these facts, clearly beyond the face of the indictment, would in fact constitute a defense on the merits at trial. That the position of Petitioner as presented to the Judge at the District Court level would have constituted a defense on the merits at trial is beyond question. The District Judge did, in fact, find under the law existent at the time, that such facts did constitute a valid defense and, therefore, granted the Motion to Dismiss.

It is also important to note at this point that the label given to the decision or order of the District Court is not controlling, *United States v. Sisson, supra,* at 288. Although the District Court labeled its decision on the Petitioner's Motion to Dismiss as an Order Dismissing the Indictment, it is clear that, in effect, the Dismissal operated as an acquittal on the merits. The First Circuit has expressed this viewpoint in the case of *United States v. Findley,* 439 F. 2d 970 (1st Cir., 1971). In a substantially similar fact situation, that court held that,

> "If a dismissal is a result of the showing of eviden-

> tiary facts, dehors the indictment, which, if established at a trial would constitute a defense on the merits, the Court's ruling, however described, . . . is, in effect, an acquittal . . ." *Findley, supra,* at 972.

This reasoning was also set forth in *United States v. Ponto*, 454 F. 2d 647 (7th Cir., 1971), and in the companion case of *United States v. Grochowski*, 454 F. 2d 655 (7th Cir., 1971).

Assuming the order was, in effect, an acquittal, the next matter to be considered would obviously be whether one could say that as a result of that fact, that jeopardy had attached. It is recognized that the general rule with reference to when jeopardy attaches is that

> "[i]n a jury case, jeopardy attaches when a jury has been impaneled and sworn; in a non-jury case, jeopardy attaches after the court has begun to hear evidence." *United States v. Pecora*, 484 F. 2d 1289, 1293 (3rd Cir., 1973).

As was stated in *Velazquez, supra,* at 1095, however,

> "[i]t is not wholly dispositive of the claim raised . . . to state that since the jury was neither waived nor impaneled, jeopardary could not have attached, although this gives rise to a strong presumption."

This is clearly the implication in *Sisson*, as well, where the statement is made that an acquittal could not be reviewed without putting the defendant twice in jeopardy. *Sisson, supra,* at 289, 290. It is to be noted as well that the Supreme Court has warned against applying mechanical tests with reference to the question as to whether or not jeopardy has attached. *Somerville, supra.* The fact that the swearing in of a jury or waiver of the right of jury trial is only a presumption as to when jeopardy attaches is also made clear by the holdings of many of the Circuit Courts of Appeal which have dealt with this issue. The United States Court of Appeals, Fourth Circuit, has recognized this precept in the case of *United States v. Southern Railway Company*, 485 F. 2d 309 (4th Cir., 1973). In that case, the Southern Railway Company was charged with having willfully

failed to observe strictly its published tariffs in violation of the Elkins Act, 49 U.S.C. §41(1). The basic charge of the Government centered around the alleged fact that Southern Railway had not required General Tire to attach manifests or execute certifications with respect to eight shipments of sponge rubber carpet purchased by General Tire and Rubber Company. Southern filed a Motion to Dismiss the Indictment and the District Court heard oral argument on that Motion at which time Southern filed an amended Motion to Dismiss over the objection of the Government. The amended Motion made the claim that the required manifests were, in fact, contained in the shipping orders attached to the shipments. The District Court then received, without objection, the shipping orders which had accompanied the shipments and copies of the applicable tariff. The court also heard oral argument at this time and each party was allowed to present its claims to the Court. The Court held, after reviewing the evidence and at the conclusion of argument, that the shipping orders constituted a manifest and, therefore, granted the defendant's Motion to Dismiss. The Government appealed the holding of the District Court, taking exception to the finding that the shipping orders complied with the manifest requirement of the tariff. Southern made the contention that the decision of the District Court was in actuality, an acquittal on the merits, and, therefore, to allow it to be tried after dismissal would constitute double jeopardy. The Court went on to state that it felt that the proper determination to be made by the Court of Appeals should be,

> "Whether the District Court's determination of the prosecution was actually an acquittal on the merits of the case." *Southern Railway, supra,* at 312.

The court went on to conclude that if the District Court's determination was found to be an acquittal, then no appeal could be taken by the Government because of the fact that jeopardy would have attached. Citing *Sisson, supra,* at 289-290. The Court reasoned that the District Court had held a full

hearing and allowed Southern to file exhibits to support its Motion to Dismiss. It then noted that the issue which was presented to the District Court was, for all practical purposes, the only issue to be tried. Upon this analysis, the court concluded that the dismissal was, in reality, a Judgment of Acquittal on the merits and, therefore, jeopardy had attached and the Government was precluded from appealing.

There is no question but that the facts in Petitioner's case are substantially similar to those in the case of Southern Railway. In both of the cases, the decision of the District Court was made on the basis of not only the Motion to Dismiss and the affidavit attached thereto, but also on the facts which were presented in addition to them. In the case at bar, the District Judge undoubtedly placed great emphasis on the Stipulation of Counsel (that Serfass had established a prima facie case for conscientious objector classification) made in court during the hearing on the Motion to Dismiss. This Stipulation was of great import as is evidenced by Footnote No. 1 in *Findley, supra,* at 972, where the Court there commented upon the question of the relevancy of establishing a prima facie case aspect regarding conscientious objector classification. The District Judge had determined that the question was not relevant but the Court of Appeals, citing *Mulloy v. United States,* 398 U.S. 410, 416, 90 S. ct. 1766, 26 L. Ed. 2d 362 (1970) states:

> "We must, accordingly, take it that in the Court's view it was immaterial whether the form was defective or insufficient on its face. Whatever the ultimate resolution of the present dispute as to the duty of the Board to specify its reasoning in refusing to reopen, if the defendant did not even have openers [Here the court is clearly referring to the question as to whether or not the defendant had made out a prima facie case.] we clearly wonder how or why he should get into the play."

After citing *Mulloy,* the Court also then referred to 32 C.F.R. §1625.2 which is the Federal Regulation dealing with the obligation of the Local Board to reopen if the registrant makes

out a prima facie, and then states that, "there is no obligation on the board if he does not." Again, the fact that this Stipulation had been entered into in the case at hand cannot be emphasized enough. It clearly is one of the things which Petitioner would have been required to prove in order for the draft board to have been under any kind of obligation to hear his claim at all. This stipulation clearly obviated any necessity for a later factual determination and was clearly needed in order for the District Judge to make a determination on the Motion to Dismiss at this point in the proceedings. See *United States v. Fargas,* 267 Fed. Supp. 452 (S.D.N.Y. 1967). This Stipulation was substantially similar to the one in which the District Court in *Southern Railway, supra,* received *"without objection"* (emphasis added) evidence that shipping orders had accompanied the shipments to General Tire, as well as copies of the tariff. In addition, in both *Southern Railway* and the case at hand, each side to the controversy was given the opportunity to argue its case.

The clear import of the case indicates that where there is an acquittal, jeopardy attaches and the United States is precluded from appealing. Other case law points in the same direction. In *United States v. Rothfelder,* 474 F. 2d 606, (6th Cir., 1973) the rationale is the same for finding the Government could not appeal, in a substantially similar case involving the Selective Service Laws, where the Court held that no appeal was available to the Government from a Judgment of Acquittal. The District Court in tnis case had granted the Defendant's Pre-Trial Motion to Dismiss the Indictment and based its finding on facts contained in the defendant's Selective Service File. For this reason, the Court found that the judgment, although characterized as the granting of a Motion to Dismiss, in effect was an acquittal.

The Third Circuit Court of Appeals in deciding the case at bar with reference to the jurisdictional question relied on its decision in *Pecora, supra,* at 1289. Pecora was indicted for allegedly having violated §302(b) of the Labor Management

Relations Act, 1947, which made it an offense for an employee representative to receive from an employer, "any payment, loan, or delivery or any money or other thing of value." 29 U.S.C. §186. The parties entered into a Stipulation of Facts upon which the indictment was based. This Stipulation was appended to *Pecora's* Motion to Dismiss the Indictment. The District Court decided that on the basis of this Stipulation of Facts upon which the indictment was based that there was no violation of the statute and, therefore, dismissed the indictment. The Government appealed the decision and the Court was faced initially with a determination as to whether or not §3731 prohibited appeal by the Government. In deciding that the Court did have jurisdiction to entertain the appeal, the court was faced with the dicta of the Supreme Court in *Brewster, supra,* at 506, noting that an appeal would not lie from a decision resting upon extraneous facts based upon a stipulated fact, or showing of other evidentiary facts outside the indictment, "which facts would constitute a defense on the merits at trial. . .". It was noted that the decision in *Brewster* was based upon an appeal under the old §3731 and also noted was the Supreme Court's citing of *Findley, supra.* With reference to the Findley decision, it was noted that the court specifically found that the defendant had not been formally placed in jeopardy and, therefore, concluded that the holding in *Brewster, supra,* was based not on jeopardy provisions but rather on the basis of the old §3731. Petitioner agrees that formal or technical jeopardy had not attached but it is submitted that constructively jeopardy had attached.

The Third Circuit in *Pecora, supra,* at 1293, also attempts to distinguish the decision in *United States v. Hill* 473 F. 2d 759 (9th Cir., 1972). It distinguished *Hill* on two grounds. First, it is noted that the Court in *Hill, supra,* did not make any determination as to whether or not the defendant had waived his right to jury trial. (See A. P, however where there is no notation in the docket entries in the District Court to indicate that any

party had waived jury trial.) The Court in *Pecora* itself recognized in its second distinction that the general principle with reference to the attachment of jeopardy being measured on whether or not jury trial has been waived or not is not fully determinative of the issue. The second distinguishing feature between *Pecora* and *Hill,* the Court noted was that evidence was actually entered into the record in the *Hill* case. "*The District Court determined the character of that evidence so it may be said that jeopardy had attached.*" (emphasis added), *Pecora, supra,* at 1293.

It is important at this point to look at the decision in *Hill. Hill* was a case in which the Government sought Writs of Mandamus directing the District Judge to vacate an Order dismissing the indictments in the case of *United States v. Linetsky,* et al., No. 7145, and *United States of America v. Carlo,* et al., No. 7142, Central District of California. The defendants had been charged with violations of 18 U.S.C. §1461, in that they knowingly deposited obscene advertisements in the United States mail. The parties entered into a Stipulation to the effect that the materials that appeared in the same were, in fact, copies of the materials upon which the indictment was based. The Defendants made a Motion to Dismiss the indictment pursuant to Rule 12, F. R. Crim. P. Hearings were held on the Motion and the defendants were allowed to introduce into evidence the Stipulated materials and certain other materials. The District Judge then made the determination that the materials which formed the basis of the indictments were, as a matter of law, not obscene and, therefore, dismissed the indictments. The Government appealed under 18 U.S.C. §3731. Here the Court reasoned that jeopardy had attached and, therefore, refused to hear the issue on the merits. The Court reasoned that since the District Court had considered evidence going to the general issue in the case, the finding, although characterized as a granting of a Motion to Dismiss, was, in effect, a holding that the defendants were not

guilty. *Hill, supra,* at 761. In arriving at its decision, the Court cited the case of *United States v. Oppenheimer,* 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161 (1916), in order to buttress its holding that the designation of the court's ruling as granting a Motion to Dismiss is not conclusive of whether or not it was, in effect, a trial. The case is also cited for the proposition that an adjudication on the merits is final. *Hill, supra,* at 761, 762. Special note should be made of the fact that the Court of Appeals believed that the District Judge "did not think that he was holding a trial; he believed that jeopardy had not attached.", *Hill, supra,* at 762. The Court goes on, however, to find that jeopardy had, in fact, attached as the Judge had decided the general issue and that in substance, though not in form, an acquittal had been granted.

The particularly relevant aspect of your Petitioner's case in light of the decision in *Hill* is that to the extent that the Third Circuit Court of Appeals attempts to distinguish the holding in *Hill* from its holding in Petitioner's case, it is clearly erroneous. As has been set forth above, it is very clear that the prior case law substantiates the fact that although Petitioner was not technically in jeopardy, the policy considerations behind the double jeopardy provisions in the Constitution would be clearly violated by allowing the Government to appeal in this situation. It is clear that as in *Hill, supra,* evidence here was actually entered into the record and it is clear also from the holding of the District Court that the entire Selective Service File, all of the Government's case, was considered.

It is clear, also, that the case of *United States v. McCreery,* 473 F. 2d 1381 (1973) which embraced the constitutional, double jeopardy theory espoused in *United States v. Ponto,* 454 F. 2d 657 (1971), would be applicable to the case at hand and would preclude an appeal by the Government. The reasoning in *Ponto, supra,* at 663 was that since the order dismissing the indictment in that case was based upon a determination on the merits, it was, in essence, an acquittal to which jeopardy had

attached. To the extent that the opinion of the concurring judges differs from the constitutional analysis as set forth in *Ponto* it is erroneous. It is submitted that to argue that although the decision in Petitioner's case by anyone's standards, would clearly bar a second prosecution, to hold that an appeal would be allowed, would be putting form over substance, a dangerous concept when dealing with basic constitutional rights. *Hill, supra,* at 763.

It is instructive at this point to note that there have been two recent cases which have had to deal with the problem of appealability in light of the other recent decisions cited above. In the case of *United States v. Walker,* 489 F. 2d 1353, (7th Cir., 1973), the Court distinguished from Walker's case the rulings in *Ponto, Growchowski, Gustavson,* and *McCreery, supra.* The distinguishing factor noted was that,

> "... each of the dismissals sustained the merits of an affirmative defense. In the case before us, however, the Government's Stipulation is a particularization of the general allegation in the indictment. By revealing the facts, it is prepared to prove, the Government has, in effect, narrowed the charge in the indictment." *Walker, supra,* at 1355, 1356.

Also in the case of *United States v. Goldstein,* 479 F. 2d 1061, (2nd Cir., 1973), the appellees attempted to rely upon the decision in *Hill, supra.* The Court, in distinguishing *Hill* stated as follows:

> "Hill involved indictments charging the sending of obscene advertisements through the mail. Defendant's Motion to Dismiss the Indictments was granted on the ground that the advertisements were not obscene as a matter of law. In finding reprosecution prohibited by the double jeopardy guarantee, the Court noted that the Judge had received evidence limited to a necessary element of the offense; the dismissal thus decided the general issue of guilt and was the equivalent of a directed acquittal." See *United States v. Sisson, supra,* 399 U.S. at 290 n. 19 90 S. Ct. 2117; *United States v.*

Ponto, 454 F. 2d 657, 663-664 (7th Cir., 1971) (en banc).

"Judge Weinstein's dismissal, by contrast, in no sense turned on the general issue of guilt or required the taking of evidence remotely related to any element of the crime."

It is very clear that both of these cases acknowledge the general proposition that although technical jeopardy may not have attached, what we might refer to as "constructive" jeopardy, may attach in circumstances like the cases of *Hill*, *McCreery* and, it is submitted, *Serfass*.

With reference to the holdings of the two circuits which might be considered to be adverse to your Petitioner's position, it is argued that they are clearly distinguishable from your Petitioner's case. The case of *United States v. Martin Linen Supply Company*, 485 F. 2d 1143, (5th Cir., 1973) is distinguishable on the ground that there was a finding that the District Judge had not commenced a hearing of the evidence. Without a doubt, at least under the rationale of *Hill*, *supra*, at 761, it cannot be argued that the District Judge in this case had not heard the Government's evidence. In fact, it is argued that by virtue of the Judge's having the whole Selective Service File to consider and by virtue of the fact that the Government had agreed that Petitioner had made out a prima facie case, all of the evidence that the Government had to present against Petitioner was, in fact, before the Judge and was considered in the decision. The case of *United States v. Brown*, 481 F. 2d 1035, (8th Cir., 1973) is also distinguishable from the case confronting your Court at present. It is clearly indicated by the Court of Appeals, Eighth Circuit, that in the *Brown* case the full evidence was not before the court. The Court found in *Brown* that factual issues had not been decided and that the only thing decided by the lower court was a decision not to accept the defendant's pleas of guilty. In Petitioner's case, it is clear, as set forth above, that factual questions which were intertwined with

the general issue were clearly set forth and the Judge made his determination on the basis of those facts.

The facts of the *Brown* case lead to another point which must be raised with reference to the question presented. In *Brown*, *supra*, special emphasis is placed upon the fact that the Government was unwilling to consent to the submission to the case to the Court on stipulation, *Brown*, *supra*, at 1038. It certainly would have been possible for the Government to do so and it is argued that if this had been done, the United States Court of Appeals, Eighth Circuit, might well have come up with a different decision. At any rate, it is clear that the District Judge in Petitioner's case was aware of the impact of the stipulation entered into by the Government and his consideration of Petitioner's whole Selective Service File. The Judge notes that the Motion to Dismiss the Indictment based upon the contention that Petitioner had been denied due process of law as a result of the Local Board's having inadequately set forth its reasons for denying Petitioner's post-induction order request to reopen his classification was a defense which would be properly raised by motion before trial. *United States v. Serfass*, No. 15229 Cr., (A. A) The statement is concluded by the recitation that this would be especially so, *"since none of the facts upon which its resolution depends is in dispute"*. *Serfass*, *supra*, at (A. A [emphasis added]). In citing authorities for his position, the Judge referred to portions of a number of cases which dealt with the authority of the Judge to rule on the dismissal motion. See *United States v. Sisson*, 1970, 399 U.S. 267, 301-02 & n. 55, 56; *United States v. Knox*, 1969, 396 U.S. 77, 83 & n. 7; *United States v. Covington*, 1969, 395 U.S. 57, 60-61; *United States v. Fargas*, S.D.N.Y. 1967, 267 F. Supp. 462, 455-57. The case of *United States v. Fargas*, *supra*, is especially instructive. In that case the defendant, indicted under 50 App. U.S.C. §462 for failure to submit to induction into the Armed Forces, moved to dismiss the indictment. In support of this dismissal

motion, the defendant submitted an affidavit citing relevant facts from his Selective Service File. The defendant made the argument that the facts as recited in this affidavit constituted a complete defense to the charge made. The District Court, noting that it could in its discretion order that a motion be deferred for determination at trial of the general issue, Rule 12(b)(4), F. R. Cr. P., denied the request to dismiss the indictment at that stage in the proceedings. The Court's rationale was based upon the belief that the defense as raised by Fargas could not be determined from the papers before the Court at that time. Fargas, as was Petitioner, was what is referred to as a late crystallizer, and was basing his dismissal motion on the same grounds as your Petitioner. The Court, in noting that it was faced with too few facts in order to determine the question, and also noting that those factual questions, were, "closely related to and intermingled with the issue which must be decided at a trial on the merits", *Fargas, supra,* at 457, decided that the motion was not ripe for determination at that time and, therefore, declined to dismiss the indictment. In light of the fact that the District Judge in the case at bar has cited *Fargas, supra,* it is the inescapable conclusion that the Judge had determined that a postponement of the determination of the motion to the time of trial was unnecessary, as the Government had stipulated the one relevant factual question which might have been necessary to be made at trial and, in addition, had considered Petitioner's entire Selective Service File, which was all the evidence that the Government had against Petitioner. (It should be noted that in refusal to submit to induction cases everything is entered in a registrant's file so that the Government need only prove the file and thus *proves* a prima facie case; thus it can safely be stated that the Government's entire case was before the District Judge.) In light of this, the inescapable conclusion again is that Petitioner's case was decided on the merits and as such, although labeled as an order dismissing the indictment, functionally was an acquittal to which jeopardy attaches.

Except for the facts which shouted from Petitioner's Selective Service File, which compelled the Government in good faith to stipulate that Petitioner had made out a prima facie case for conscientious objector status, there was no necessity for the Government to agree to this. It was clearly a factual matter which the Court would have had to determine at trial in order for the holdings in *United States v. Ziskowski,* 465 F. 2d 480, (3rd Cir., 1972) and other similar cases even to have applied to the question presented before the District Court. If the facts were not there the Government was certainly free to oppose the Motion to Dismiss on the basis that it contested the fact that Petitioner had made out a prima facie case as a conscientious objector. Also, to the extent that the District Judge's analysis of his authority to entertain the Motion at that time was improper a suggestion Petitioner strongly doubts, Petitioner should certainly not have to bear the burden of being subjected to another "go-around" with the Government as a result of that. See *Hill, supra,* at 762.

A final argument centers around the oft-mentioned caveat regarding the fact that the question as to whether or not jeopardy attaches is not to be decided by a mechanical test. *Illinois v. Somerville,* 410 U.S. 458, (1973); *United States v. Jorn,* 400 U.S. 470 (1971); *United States v. Sisson,* 399 U.S. 267, (1970). It is unmistakably clear that had either the court ordered that it could not determine the Motion to Dismiss at that time and directed that the parties proceed to trial, see *Fargas, supra,* or had Petitioner proceeded to have a jury impaneled and sworn, technical jeopardy would have attached. See *Findley, supra,* at 974. It is important to note that the announced purpose of the Federal Rules of Criminal Procedure, Rule 2, is as follows:

> "These rules are intended to provide for the *just* determination of every criminal proceeding (emphasis added). They shall be construed to secure simplicity in procedure, fairness in administration and the *elimina-*

tion of unjustifiable expense and delay." (emphasis added.)

It is suggested that the Criminal Appeals Act and the Federal Rules of Criminal Procedure ought to work together, at least to the extent that if what is in effect an acquittal is entered, as in this case, on a Motion to Dismiss an Indictment before a jury has been impaneled and that dismissal is based upon stipulated facts and all the evidence which the Government had to present, jeopardy should be held to have attached and an Appeal should be barred.

There is some concern as was expressed in the majority opinion in *Velazquez, supra,* at 1100, that the power should not be given to a trial judge at this stage in the proceedings to forever bar further prosecution of a criminal defendant. But the dissent in *Velazquez, supra,* at 1113, amply points out that the Judge, in fact, has that power now either to dismiss the indictment on undisputed facts after the trial has commenced or by the directing of an acquittal at the close of the Government's case. This is, of course, amply pointed out by the decision of the Supreme Court in *Fong Foo v. United States,* 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671 (1962). In that case the Judge directed the jury to return verdicts of acquittal on the basis that Government witnesses were, up to that point, incredible, and on the alleged improper conduct on the part of the Assistant United States Attorney prosecuting the case. The Supreme Court held that the judgment of acquittal, even though based upon "an egregiously erroneous foundation," was final and therefore could not be reviewed without putting the petitioners twice in jeopardy in violation of the United States Constitution.

Surely justice would dictate that in a case where the Government's evidence has been thoroughly reviewed by the District Court and, what is in effect, a judgment of acquittal has been entered for Petitioner, that justice would dictate that he should not be subject to any further actions against him, even in the form of an appeal, by the Government.

CONCLUSION

Petitioner (the Defendant) was twice put in jeopardy and therefore the judgment of the Court of Appeals regarding the finding that it had jurisdiction should be reversed and the Order of the District Court Dismissing the Indictment should therefore be reinstated.

Respectfully submitted,

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